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March 10, 2005

VIA EMAIL AND OVERNIGHT DELIVERY

Ms. Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: D.T.E. 04-33: Petition of Verizon New England, Inc. for Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts, Pursuant to Section 252 of the Communications act of 1934, as Amended, and the Triennial Review Order

Dear Ms. Cottrell:

On March 4, 2005, BridgeCom International, Inc., Broadview Networks, Inc. Broadview NP Acquisition Corp., A.R.C. Networks, Inc. d/b/a/ InfoHighway Communications Corp., DSCI Corporation, XO Massachusetts, Inc. and XO Communications, Inc. ("Petitioners"), through counsel, filed a Petition for Emergency Declaratory Relief seeking a ruling by the D.T.E. preventing Verizon New England, Inc. from breaching its interconnection agreements with Petitioners by unilaterally rejecting orders for certain unbundled Network Elements ("UNEs") and UNE combinations commencing on or around March 11, 2005. Since the filing of that Petition, a number of state regulatory commissions have ordered the RBOC in their state to continue to offer the same UNEs and UNE combinations as required by CLECs' current interconnection agreements until those interconnection agreements can be amended pursuant to section 252 of the 1996 Telecom Act.

Yesterday, the Illinois Commerce Commission found that CLECs would "suffer irreparable harm in their ability to serve customers if emergency relief were not granted, and that

certain emergency relief . . . is in the public interest."[1] Also yesterday, the Michigan Public Service Commission ruled that SBC must follow the change in law requirements of its interconnection agreements and the Michigan PSC ordered SBC to continue to "provision local service requests for mass market unbundled local switching, unbundled network element-platform, DS1 and DS3 high-capacity loops, DS1 and DS3 dedicated transport, and dark fiber loops on or after March 11, 2005, consistent with the requirements of [its] order."[2] Similarly, on March 8, 2005, the Georgia Public Service Commission ruled that BellSouth must continue to process UNE-P, loop, and transport orders after March 11th and ordered all parties to "abide by the change in law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order . . ."[3] Finally, on March 9th, the Alabama Public Service Commission ruled that "BellSouth shall not, until further notice from this Commission, cease the provision of any UNE required to be provided pursuant to an existing interconnection agreement and shall provide such UNEs according to the rates established or otherwise referenced in such agreements."[4] Copies of each of these orders are attached hereto.

Please include this letter and accompanying state commission orders in the record for this proceeding.

Sincerely,

Brett Freedson / KB

Brett H. Freedson

cc: D.T.E. 04-33 Service List

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1 *See Cbeyond Communications v. Illinois Bell Tel. Co.,* Docket No. 05-0154, Order Granting Emergency Relief at 8 (Ill. C.C. March 7, 2005) (copy attached).

2 *See In the matter to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon,* Case No. U-14447, Order at 13 (Mich. P.S.C. March 9, 2005) (copy attached).

3 *See Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements,* Docket No. 19341-U, Order on MCI's Motion for Emergency Relief Concerning UNE-P Orders at 7 (Ga. P.S.C. March 09, 2005) (copy attached).

4 *See Temporary Standstill Order and Order Scheduling Oral Argument* at 9-10, Docket 29393 (Ala. P.S.C. March 9, 2005) (copy attached).

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLP,	:	
Global TelData II, LLC f/k/a	:	
Global TelData, Inc.,	:	**05-0154**
Nuvox Communications of Illinois, Inc.	:	
and Talk America Inc.	:	
-vs-	:	
Illinois Bell Telephone Company	:	

ORDER GRANTING EMERGENCY RELIEF

By the Commission (through its Administrative Law Judge):

I. Procedural History

On March 7, 2005, Cbeyond Communications, LLP, Global TelData, Inc., Nuvox Communications of Illinois, Inc., and Talk America, Inc. ("Complainants"), filed this verified Complaint against Illinois Bell Telephone Company, d/b/a SBC Illinois ("SBC"), alleging that SBC is in violation of each of the following: its interconnection agreements ("ICAs") with each of the Complainants; its Illinois intrastate tariffs; Section 13-801 Illinois Public Utilities Act ("Illinois Act")[1]; the Commission's Order in Docket 01-0614; the Federal Communications Commission's ("FCC's") SBC/Ameritech Merger Order; provisions of the FCC's Triennial Review Remand Order ("TRRO")[2]; and Section 13-514[3] of the Illinois Act. Applicants contend that SBC has affronted these authorities by issuing Accessible Letters stating that, effective March 11, 2005, SBC will not accept new orders for certain unbundled network elements ("UNEs") and will increase certain UNE rates.

The Complaint also contains a request for emergency relief. The specific components of that request are set forth in Section III of this Ruling, below.

On March 8, 2005, SBC filed a Response in Opposition ("Response") to Complainants' request for emergency relief. SBC urges the Commission to deny that request in all respects.

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[1] 220 ILCS 5/13-801.

[2] Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313; CC Docket No. 01-338, Order on Remand, (released Feb. 4, 2005).

[3] 220 ILCS 5/13-514.

II. The Complaint

As discussed above, the Complaint alleges violations of the parties' respective ICAs, the Illinois Act, SBC's Illinois tariffs, and Orders issued this Commission and the FCC. The Complaint seeks declaratory and injunctive relief with respect to these claims, as well as damages, costs and fees. Complainants also request the imposition of penalties on SBC. All of the purported violations arise from SBC's publication of Accessible Letters stating that SBC would not accept or process new orders for mass market switching, DS1, DS3 and dark fiber loops and dedicated DS1, DS3 and dark fiber transport.

Complainants aver that they have each satisfied the notice requirement in subsection 13-515(c) of the Illinois Act by sending letters to SBC on March 2 and 3, 2005, requesting that SBC correct certain conduct identified in that correspondence within 48 hours. Complaint, Ex. A. SBC apparently received that correspondence, as evidenced by electronic mail attached to the Complaint. *Id.*

III. Emergency Relief Requested

Complainants ask for emergency relief in the following manner: "Grant [Complainants] an emergency order pursuant to Section 13-515(e) of the [Illinois Act] as requested herein." The Commission assumes that this general request is associated with the following elements in the prayer for relief in the Complaint

> C. Order SBC Illinois to cease and desist from its breaching the terms of the current interconnection agreements between it and the individual Joint CLECs;
>
> ***
>
> E. Order SBC to cease and desist from violating Section 13-801(a), Section 13-801(d)(3) and Section 13-801(d)(4) of the Illinois Public Utilities Act;
>
> F. Order SBC to cease and desist from violating the Commissions findings in its Order in ICC Docket No. 01-0614;
>
> G. Order SBC to cease and desist from violating the provisions of its valid intrastate tariffs obligating SBC Illinois to provide unbundled access to network elements and combinations of network elements at the tariffed rates;
>
> H. Order SBC to cease and desist from violating the FCC's findings in the *SBC/Ameritech Merger Order*;

I. Order SBC to cease and desist from violating Sections 13-514(1), 13-514(2), 13-514(6), 13-514(8), 13-514(10), 13-514(11) and 13-514(12) of the Illinois Public Utilities Act;

J. Order SBC to cease and desist from any imposition of unreasonable obstacles or charges on the Joint CLECs attempts to commingle special access and UNEs.

IV. Applicable Statute

The law governing a request for emergency relief by a telecommunications provider is set forth in subsection 5/13-515(e) of the Illinois Act:

> If the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for an order for an order for emergency relief. The Commission, acting through its designated hearing examiner or arbitrator, shall act upon such a request within 2 business days of the filing of the complaint. An order for emergency relief may be granted, without an evidentiary hearing, upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest. An order for emergency relief shall include a finding that the requirements of this subsection have been fulfilled and shall specify the directives that must be fulfilled by the respondent and deadlines for meeting those directives. The decision of the hearing examiner or arbitrator to grant or deny emergency relief shall be considered an order of the Commission unless the Commission enters its own order within 2 calendar days of the decision of the hearing examiner or arbitrator. The order for emergency relief may require the responding party to act or refrain from acting so as to protect the provision of competitive service offerings to customers. Any action required by an emergency relief order must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order.

220 ILCS 5/13-515(e).

V. Commission Analysis and Conclusion

Initially, the Commission concludes that discontinuing the offering of certain UNEs meets the threshold requirement in subsection 13-515(e) that the conduct alleged in a complaint must have "a substantial adverse effect on the ability of the complainant to provide service to customers." As Complainants argue, the sudden inability to offer certain products to end-users may result in the loss of customers and difficulty in competing for new customers.

In the context of ruling Complainant's request for emergency relief, we find it necessary to consider only whether the Federal Communications Commission ("FCC"), in the TRRO, held that any changes to an existing ICA for the purpose of implementing the TRRO must be accomplished through the negotiation, mediation and arbitration procedures contained in Section 252 and the parties' respective ICAs. If that claim is correct, it follows that unilateral implementation by SBC, in the manner set forth in the pertinent Accessible Letters, ignores Section 252 and the ICAs and contravenes the TRRO.

A. The basis for emergency relief

Subsection 13-515(c) establishes three conditions for emergency relief: "[1] that the party seeking relief will likely succeed on the merits, [2] that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and [3] that the order is in the public interest." The Commission has addressed these conditions in previous proceedings. Order Granting Emergency Relief, Docket 02-0443, July 8, 2002, ("Ameritech Emergency Relief Order"); Order Granting Emergency Relief, Docket 02-0160, Feb. 27, 2002, ("Z-Tel Emergency Relief Order").

Regarding the likelihood of success on the merits, a party seeking a preliminary injunction in the Illinois courts need not prove its entire case with respect to an asserted right. Instead, it is required only to show that it raises a "fair question" about the existence of that right and "that the trial court should preserve the status quo until the case can be decided on its merits." C.D. Peters Co. v. Tri-City Regional Port District, 281 Ill. App. 3d 41, 47, 216 Ill. Dec. 876, 880, 666 N.E. 2d 44, 48 (5th Dist. 1996). The Commission applied that standard in the Ameritech Emergency Relief Order and in the Z-Tel Emergency Relief Order.

In the TRRO, the FCC plainly stated that "carriers must implement changes to their [ICAs] consistent with our conclusions in this Order." TRRO, ¶233. Thus, there is no question that the parties here will have to revise their ICAs to reflect the FCC's current view of availability and pricing for the UNEs addressed in the TRRO. Accordingly, SBC's intention to transact business with Complainants in a manner that differs from certain substantive provisions of the parties' existing ICAs is supported by the TRRO. For purposes of emergency relief, however, the question is whether SBC can ignore certain terms of its ICAs *now*, without first altering the terms of those ICAs

through bilateral negotiations and, if needed, dispute resolution proceedings, with each Complainant. In other words, the dispositive issue is not whether the parties' ICAs and business dealings must change, but *how* such change must occur and *when* the parties can begin operating under revised terms.

For the purpose of resolving Complainants' emergency relief request, the Commission concludes that Complainants have, at a minimum, raised a fair question of whether the parties must conduct negotiations and, if necessary, utilize dispute resolution mechanisms *prior to* modifying their existing ICAs and transacting business in a manner inconsistent with those ICAs. The FCC flatly stated: "We expect that [ILECs] and competing carriers will implement the Commission's findings as directed by section 252 of the [Federal] Act." TRRO, ¶233. Section 252 contemplates bilateral negotiation and, when needed, arbitration or mediation. It does not contemplate unilateral action, either to alter an ICA or to transact business as if that ICA had already been altered.

SBC expresses considerable concern that negotiation and dispute resolution will result in delayed implementation of the FCC's TRRO directives, adversely affecting SBC. However, the FCC anticipated that some delay would inevitably occur in implementation. The familiar processes described in Section 252 inherently take time, and the FCC did nothing to compress those processes. Instead, it warned carriers to not "unreasonably" delay implementation of the TRRO and encouraged state commissions to guard against "unnecessary" delay. Had the FCC intended that ILECs would unilaterally alter the ground-rules in existing ICAs, and to immediately conduct business under modified terms – that is, if the FCC had intended to avert *any* delay in implementation - it would have said so. But it did not. It prescribed a bilateral process with built-in time requirements.

SBC also takes the position that its Accessible Letters "faithfully track" the TRRO's provisions and, therefore, must be viewed as simple implementation of "unambiguous and unconditional" requirements, not unilateral terms. Response at 7. In effect, SBC is claiming that there is nothing for the parties to negotiate (although SBC does acknowledge that ICA negotiations must take place, albeit while the parties transact business under SBCs new terms). The Commission disagrees, for several reasons.

First, for some of the UNEs involved here, the FCC established numerical impairment thresholds in the TRRO[4]. SBC's Accessible Letters provide no process for determining, or disputing, whether those thresholds have been reached.

Second, the TRRO provides that a CLEC may self-certify that it is entitled to unbundled access to certain UNEs. TRRO, ¶233. When that occurs, the ILEC "must immediately process the request" and utilize ICA dispute resolution mechanisms if it questions the CLEC's self-certification. *Id.* SBC's Accessible Letters appear to turn this

[4] With respect to DS1 loops, for example, the number of business lines or collocators at a wire center, or the number of loops in a building, will determine the availability of that UNE.

process around, permitting SBC to reject any request it regards as "new," and leaving the burden of dispute resolution to the CLEC.

Third, even when it is otherwise undisputed that a "new" UNE need not be provided, as with dark fiber, it must still be provided to the CLEC's "embedded base" during the applicable transition period created in the TRRO. The Accessible Letters assume that the "embedded base" refers to the specific UNEs that will be in place on March 11, 2005. Complainants argue, however, that the "embedded base" refers to existing customers on that date, rather than to the specific UNEs those customers are using. Complaint at 16. Without deciding now whose position is correct - we see support for both positions in the text of the TRRO - this very dispute indicates that implementation of the TRRO is not "unambiguous," as SBC views it.

Complainant's likelihood of success on the merits must also be determined in the context of Section 13-514 of the Illinois Act, which Section 13-515 helps implement. Section 13-514 states that a telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. Complainants have raised a fair question as to whether SBC has violated Section 13-514's general prohibition, as well as the particular *per se* impediments included in subsections 13-514 (6), (8), and (10)[5].

To be clear, we do not find at this preliminary stage that the substantive provisions in SBC's Accessible Letters plainly contradict the TRRO or any other authority. Rather, we simply hold now that Complainants have presented a fair question of whether the use of the unilateral Accessible Letters, instead of Section 252 processes, to modify the terms under which the parties will presently transact business, is authorized by the TRRO. Indeed, our preliminary conclusion is that the TRRO does not permit such self-help. Moreover, the Accessible Letters do not address, or may wrongly decide, how some of the details of TRRO implementation will be accomplished. For the time being, we believe that the FCC intended for those details to be addressed through bilateral negotiations and, if needed, dispute resolution.

Concerning irreparable harm, we have previously that such harm need not be beyond the possibility of repair or beyond compensation in damages. Z-Tel Emergency Relief Order; Prentice Medical Corp. v. Todd, 145 Ill. App. 3d 692, 701 (1st Dist. 1986). Irreparable harm includes transgressions of a continuing nature, such as damage to the good will or competitive position of a business, which would be incalculable. *Id.* Further, prolonged interruptions in the continuity of business relationships can cause irremediable damages for which no compensation would be adequate. *Id.*

According to Complainants, the principal harm that would allegedly result here is that Complainants would be handicapped in their provision of services to both existing

[5] *E.g.*, subsection 13-514(8) states that it is a *per se* impediment to the development of competition for a carrier to violate "the terms of or unreasonably delay[] implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impeded the availability.

and new customers. Complaint at 44. This would purportedly harm their customer relations and reputation in the marketplace. Moreover, Complainants emphasize that such harm would occur in a competitive context, in which SBC itself would derive benefit from the harm it ostensibly caused Complainants.

SBC responds that Complainants can readily obtain alternative services, whether from SBC or other providers. Indeed, SBC stresses, the FCC found in the TRRO that CLECs face no impairment in connection with certain UNEs precisely because market alternatives are easily obtained. Response at 23.

With respect to the availability of the UNEs involved here, the Commission finds that irreparable harm is a reasonably predictable outcome if SBC were permitted to insist upon immediate compliance with its Accessible Letters. The potential impact of sudden disruption of Complainants' operations, and of the services, service quality and reliability enjoyed by their customers, is sufficient to provide relief now. Moreover, the monetary value of such disruption, along with the value of lost goodwill in the market, cannot be readily quantified for compensation purposes. While alternative suppliers exist, the quality, reliability and cost of their offerings could cause service interruptions, diminished service quality and cash-flow or credit problems for Complainants. Further, Complainants would have to make immediate decisions on these matters (before March 11) and other providers would be aware of, and could exploit, such immediacy. We believe that the FCC, in the TRRO, was very mindful of the need for orderly transitions by carriers. Ultimately, if we denied emergency relief, Complainants might win the battle in this proceeding and still lose the war for customers, because of the repetition of service adjustments (i.e., an adjustment now to comply with Accessible Letters, and a subsequent adjustment if they prevailed on the merits later).

In contrast, with regard to pricing, the Commission cannot conclude that Complainants would suffer irreparable harm if the price increases in the Accessible Letters, which mirror the increases mandated by the TRRO, took immediate effect. Those increases are precisely quantified now and will remain so at the end of this case. Consequently, if Complainants prevail on their underlying Complaint, compensation can be precisely quantified. Thus, while Complainants would suffer harm if SBC incorrectly applies a price increase to a given UNE, that harm would not be irreparable.

Concerning the public interest, we discussed above some of the harm to Complainants' customers that is predictably associated with the harm that Complainants would likely incur from immediate changes to UNE availability. In addition, all telecommunications customers could be adversely affected by damage to the fair and effective competition promoted by the Illinois Act.

As previously stated, since we will order emergency relief with respect to UNE availability, based on our interpretation of the TRRO, Section 252 and the parties existing ICAs, we will not address Complainants' other basis for emergency relief.

B. The contents of emergency relief

The actions required by an emergency relief order under subsection 13-515(e) "must be technically feasible and economically reasonable and the respondent must be given a reasonable period to time to comply with the order." 220 ILCS 5/13-515(e). In this instance, we will require SBC refrain from implementing the terms and provisions of its Accessible Letters, except for pricing provisions that completely and accurately reflect the pricing provisions of the TRRO. Therefore, SBC must continue making the pertinent UNEs available to Complainants without reference to the Accessible Letters or the contents of those letters (except pricing provisions). This requirement to maintain the pre-March 11 status quo is unquestionably technically feasible. It is also economically reasonable, since the terms and conditions in the parties' ICAs have been approved by this Commission. SBC does not argue otherwise. Moreover, SBC is not precluded from implementing the price increases prescribed in the TRRO (because of our ruling, above, regarding irreparable harm).

This emergency Order is effective until the parties have an amended their ICAs pursuant to the process contained in Section 252 of the Federal Act or as directed by the Commission in a Order in this proceeding.

VI. Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Complainants are telecommunications carriers within the meaning of Section 13-202 the Act and are authorized to provide local exchange service within the State of Illinois;

(2) SBC is a telecommunications carrier within the meaning of Section 13-202 of the Act and is authorized to provide local exchange service within the State of Illinois;

(3) the Commission has jurisdiction over the parties and the subject matter of this Complaint;

(4) Complainants have shown that the conduct alleged in the Complaint is likely to have a substantial adverse effect on it ability to provide service to customers;

(5) Complainants have also shown that they will likely succeed on the merits with regard to immediate implementation of SBC's Accessible Letters , that they will suffer irreparable harm in their ability to serve customers if emergency relief is not granted, and that certain emergency relief described in the prefatory portion of this Order is in the public interest;

(6) Complainants have shown that certain emergency relief described in the prefatory portion of this Order is technically feasible and economically reasonable;

(7) Complainants should be granted the following relief:

SBC should be ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS THEREFORE ORDERED that Complainants' Motion for Emergency Relief is granted in part and denied in part.

IT IS FURTHER ORDERED that SBC is ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS FURTHER ORDERED that the relief ordered herein is interim in nature and that the Commission shall conduct a hearing on the remaining allegations of the Complaint.

IT IS FURTHER ORDERED that this decision is not a final order and is not subject to the Administrative Review Law.

By decision of the Administrative Law Judge this 9th day of March, 2005.

David Gilbert
Administrative Law Judge

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by **SBC MICHIGAN** and **VERIZON**.	)))))	Case No. U-14447

At the March 9, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER

On February 28, 2005, the Commission commenced a collaborative process for implementation of "Accessible Letters" issued by SBC Michigan (SBC) and Verizon. The collaborative was instituted after a number of competitive local exchange carriers (CLECs), including Talk America Inc. (Talk), and XO Communications, Inc. (XO), filed objections to certain proposals and pronouncements made in five Accessible Letters dated February 10 and 11, 2005 by SBC, which is an incumbent local exchange carrier (ILEC) under the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*

Accessible Letter No. CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p. 1. Accessible Letter No. CLECALL05-017 and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC

will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a $1 surcharge for mass market ULS and UNE-P. Accessible Letter No. CLECALL05-019 and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005, SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.[1]

On March 7, 2005, Talk and XO filed a joint emergency motion requesting the Commission to address certain issues that have arisen during the initial phases of the collaborative that they allege demand immediate attention. According to Talk and XO, at the first collaborative meeting, SBC reiterated its intent to act unilaterally on March 11, 2005 pursuant to its Accessible Letters. Talk and XO insist that SBC's threatened and impending actions would violate the plain language of the Federal Communications Commission's (FCC) February 4, 2005 order regarding unbundling obligations of ILECs.[2] Talk and XO have identified the following issues due to their effect on the

[1]The Commission became aware that Verizon had issued at least two similar Accessible Letters. Because the arguments raised by the CLECs with regard to SBC's proposed actions applied with equal force to the actions proposed by Verizon, the Commission included Verizon in the collaborative process. However, the Commission notes that the motion filed by Talk and XO does not include any requested relief with regard to Verizon.

[2]*In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338. *(TRO Remand Order).*

CLECs and because these matters appear to be contrary to the direction of the FCC in the *TRO Remand Order*:

1. Citing Paragraph 234 of the *TRO Remand Order,* Talk and XO argue that SBC has threatened not to provision high-capacity loops and transport on and after March 11, 2005 even where a CLEC has undertaken a reasonably diligent inquiry and, based on that inquiry, self-certifies that, to the best of its knowledge, its request is consistent with the requirements of the *TRO Remand Order.* Instead, they maintain that SBC has threatened to reject any such orders that SBC believes does not satisfy the *TRO Remand Order.*

2. Talk and XO contend that SBC has threatened to cease providing access on and after March 11, 2005 to unbundled local switching to CLECs seeking to serve their embedded base of end-user customers as required by 47 CFR 51.319(d)(2)(iii) during the 12-month transition period. Instead, they maintain that SBC has stated that it will reject all move, add, and change orders[3] submitted by CLECs to serve their embedded base of end-user customers.

3. Citing footnote 398 in Paragraph 142 of the *TRO Remand Order,* Talk and XO insist that SBC intends to self-implement rule changes that favor SBC while at the same time refusing to implement rule changes from the FCC's 2003 Triennial Review Order (*TRO*)[4] that were unaffected by United States Circuit Court of Appeals' decision in *United States Telecom Assn v Federal Communications Comm,* 359 F3d 554 (DC Cir 2004) (*USTA II*) or the *TRO Remand Order,* despite the fact that the *TRO Remand Order* recognized that the *TRO* rule changes should be implemented to minimize the adverse impact of the *TRO Remand Order* on CLECs.

Additionally, citing Paragraphs 233, 143, 196, and 227 of the *TRO Remand Order,* Talk and XO argue that SBC intends to implement these and other changes without regard to the "change of law" provisions in their existing interconnection agreements with SBC. Talk and XO state that

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[3]A move order is submitted by a CLEC to an ILEC when an existing CLEC customer moves to a new address. An add order is submitted when an existing customer seeks to add an additional line to his service. A change order is submitted when an existing customer seeks to add or delete a feature, such as three-way calling.

[4]*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003).

they filed this motion to seek a Commission order requiring SBC, at minimum, to abide by the terms of the *TRO Remand Order*. Accordingly, Talk and XO request that the Commission grant their emergency motion and order SBC to continue provisioning additional UNE-P access lines to serve a CLEC's embedded base of end-user customers. Talk and XO also assert that the Commission must order SBC to provision moves and changes in UNE-P access lines in a manner that will allow a CLEC to serve the needs of its embedded base of end-user customers during the 12-month transition period of the *TRO Remand Order*.

Talk and XO insist that SBC must be ordered to continue to process requests for access to a dedicated transport or high capacity loop UNE upon receipt of a self-certification from the requesting provider, that to the best of its knowledge, the requesting provider believes to be consistent with the requirements of the *TRO Remand Order*. Talk and XO contend that the Commission should order that SBC may not refuse to process such requests based solely on SBC's belief the requesting provider's self-certification is defective or that the provider did not engage in a reasonably diligent inquiry. Talk and XO maintain that, before implementation of the *TRO Remand Order* rules, SBC should be directed to implement the *TRO* rules unaffected by *USTA II* or the *TRO Remand Order*, such as (1) routine network modifications to unbundled facilities, including loops and transport, at no additional cost or charge, where the requested transmission facilities have already been constructed [*See*, 47 CFR 51.319(a)(8), 51.319(e)(5)], (2) commingling an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a CLEC has obtained at wholesale [*See*, 47 CFR 51.309(e) and (f) and 51.318], and (3) the CLEC certification regarding the qualifying service eligibility criteria for each high-capacity enhanced extended loop/link (EEL)[5] circuits [*See*, 47 CFR 51.318(b)].

[5]A loop to a connection between two or more central offices.

At a session of the collaborative held on March 7, 2005, Orjiakor Isiogu, Director of the Commission's Telecommunications Division, who was designated by the Commission to oversee the collaborative, announced that responses to Talk's and XO's motion had to be filed no later than 5:00 p.m. on March 8, 2005, which is permitted pursuant to Rule 335(3) of the Commission's Rules of Practice and Procedure, R 460.17335(3), and that the Commission intended to act on Talk's and XO's motion on March 9, 2005.

Responses in support of the motion were filed by the Commission Staff, Attorney General Michael A. Cox, AT&T Communications of Michigan, Inc., and TCG Detroit, LDMI Telecommunications, Inc., TDS Metrocom, LLC, MCImetro Access Transmission Services LLC, McLeodUSA Telecommunications Services, Inc., and TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., CMC Telecom, Inc., Grid 4 Communications, Inc., Zenk Group, Ltd., d/b/a Planet Access, CTS Communications, Inc., and Global Connection Inc. of America. In the interests of time, the Commission simply notes the general agreement of these parties with the positions taken by Talk and XO.

SBC and Verizon filed responses in opposition to the motion.[6] SBC urges the Commission to reject the attempt to delay its lawful and appropriate implementation of the FCC's new rules. In so doing, SBC maintains that the Commission's previous determinations concerning adherence to change of law provisions in interconnection agreements and claims that ILECs are forcing contract terms on CLECs are not at issue in this proceeding. Rather, SBC insists that the motion asks for relief of an extraordinary nature that the Commission has no authority to grant. SBC complains that the motion is bereft of any reference to the Commission's authority to entertain the motion.

[6]Verizon's comments are consistent with the comments filed by SBC.

According to SBC, it would be wrong for the Commission to act in haste or without carefully examining its authority to do so.

Next, SBC calls upon the Commission to question whether the relief requested by Talk and XO should be granted in the absence of some showing by the CLECs that they will ever place an order with SBC that SBC will reject. According to SBC, Talk and XO simply failed to assert that they will be harmed. SBC explains that it has already disclosed a list of wire centers that meet the *TRO Remand Order* non-impairment thresholds for high capacity loop and dedicated transport facilities. *See*, Exhibit A to SBC's response. After citing a portion of Paragraph 234 of the *TRO Remand Order*, SBC asserts that:

> SBC Michigan does not believe it will be possible for any CLEC to make the required "reasonably diligent inquiry" and then to certify that it is entitled to high-capacity dedicated transport between two offices that are on the list SBC submitted to the FCC, or that it is entitled to a high-capacity loop in a wire center that is on the list SBC submitted to the FCC. That is especially so in view of the fact that the CLECs also have access, subject to protective order, to data SBC has filed with the FCC underlying the list SBC has submitted. Accordingly, consistent with the *TRRO*, SBC Michigan does not expect to receive or process after March 11, 2005, any CLEC orders for high capacity loops or dedicated transport involving wire centers that are on those lists.

SBC's response, p. 5. Moreover, SBC contends that the failure of Talk and XO to affirmatively allege that they will suffer harm by SBC's implementation of its determinations is reason enough to reject their motion.

With regard to new UNE-P arrangements, SBC stresses that the FCC has instituted a nationwide bar on UNE-P. Citing myriad paragraphs of the *TRO Remand Order*, including Paragraphs 5, 204, 210, 227, and 228, SBC insists that the FCC only required UNE-P to be made available during the transition period to the embedded base of lines, not the embedded base of customers, as alleged by Talk and XO. According to SBC, as of March 11, 2005, it has been relieved of the obligation to provision new UNE-P arrangements of any kind. SBC argues that the

FCC would not have intended the interpretation proffered by Talk and XO because it would perpetuate earlier illegal attempts to broadly define impairment. SBC also argues that an unscrupulous CLEC might even attempt to evade the FCC's ban on new UNE-P deployment by disconnecting existing lines and ordering new ones.

Finally, in response to the change of law argument raised by Talk and XO, SBC contends that the operative language in their interconnection agreements provides an ample basis for rejecting their positions. According to SBC, even apart from what the *TRO Remand Order* provides, the plain language of Talk's and XO's interconnection agreements invalidates any contractual obligation by SBC that is inconsistent with those new rules as of March 11, 2005.

The Commission finds that the relief requested by Talk and XO should be granted and that the Commission has the authority to do so. In so doing, the Commission rejects SBC's position that the Commission has no authority to address the merits of Talk's and XO's motion. In Paragraph 233 of the *TRO Remand Order*, the FCC stated that ILECs and CLECs must implement changes to their interconnection agreements consistent with the *TRO Remand Order*. The FCC also stated that the ILECs and CLECs are obligated to negotiate in good faith under Section 251(c)(1) of the FTA regarding any rates, terms, and conditions necessary to implement the rule changes. Indeed, the FCC explicitly observed that "[w]e encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." Paragraph 233 of the *TRO Remand Order*. As first noted in the February 28 order, the quoted portion of Paragraph 233 indicates that the FCC does not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order. It also indicates that the Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. In Paragraph

233, the FCC stated that Section 251(c)(1) applies to the efforts of the ILECs and CLECs to implement changes to their interconnection agreements. Section 251(c)(1) specifically requires that such negotiations are governed by Section 252 of the FTA. Additionally, notwithstanding whether the negotiations are voluntary under Section 252(a)(1) or subject to compulsory arbitration under Section 252(b)(1), Congress has required that the resulting interconnection agreement is subject to approval by this Commission. Moreover, the Commission notes that the Legislature specifically granted the Commission "the jurisdiction and authority to administer ... all federal telecommunications laws, rules, orders, and regulations that are delegated to the state." MCL 484.2201. Therefore, the Commission finds that there is no merit to SBC's claim that the Commission lacks jurisdiction to entertain Talk's and XO's motion.

The Commission also rejects SBC's procedural and policy complaints about Talk's and XO's motion. To begin with, contrary to SBC's argument, the motion does not involve "an affirmative injunction of apparent indefinite duration." SBC response, p. 2. In setting up the collaborative, the Commission directed that "the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days." February 28 order, p. 6. Beyond the time necessary for the completion of the work of the collaborative, it was the FCC that established the duration of the transition period for implementation of the *TRO Remand Order*. While SBC may be dissatisfied with the length of the transition period, that issue is not before the Commission. Rather, Talk's and XO's motion concerns the fact that SBC is threatening to violate the FCC's *TRO Remand Order* by denying access to essential UNEs that they allege the FCC required ILECs to provision for the duration of the transition period.

Likewise, the Commission does not conclude that its decision to take up this matter on an expedited basis is objectionable. The motion filed by Talk and XO raised a matter of extreme

urgency. The Commission's motion pleading rules, which are set forth at R 460.17335, specifically allow for the shortening of the time for the filing of responsive pleadings, which was communicated to participants at the March 7, 2005 collaborative meeting. The Commission finds that even a cursory examination of the volume and quality of the responses filed by the parties contradicts SBC's bare allegation that the notice was "absurdly short." SBC's response, p. 2.

Turning to the merits of the motion, the Commission is persuaded that SBC's position with regard to its ability to review and reject a CLEC's self-certification for the purposes of Paragraph 234 of the *TRO Remand Order* is inconsistent with the clear and unambiguous language used by the FCC. Paragraph 234 of the *TRO Remand Order* states:

> We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). **Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.**

Paragraph 234 of the *TRO Remand Order*. (Emphasis added, footnotes deleted).

The language used by the FCC does not indicate that an ILEC may unilaterally take any action to reject the effort of a CLEC to self-certify impairment for the purposes of the provisioning of access to dedicated transport and high-capacity loops. Rather, the FCC required ILECs to accept that such representations are facially valid and only subject to after-the-fact scrutiny. Accordingly,

SBC may not reject a CLEC's request to provision high capacity loops and transport without a review by this Commission.

Likewise, the Commission finds that Talk and XO have correctly interpreted the intent of the *TRO Remand Order* with regard to move, add, and change orders necessary ***to meet the needs of its embedded customer base*** during the transition period established by the FCC. Paragraph 199 of the *TRO Remand Order* is typical of the provisions made for the transition period by the FCC:

> Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.

Paragraph 199 of the *TRO Remand Order*, pp. 109-110. (Footnote deleted).

During the 12-month transition period an ILEC is required to provide unbundled local switching to a CLEC to allow the CLEC to serve its embedded base of end-user customers as shown by Rule 51.319(d)(2)(i) and (iii), which in relevant part, provides:

> (i) An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.
>
> * * * * *
>
> (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers.

AL-18 sets forth SBC's position that on and after March 11, 2005, the *TRO Remand Order* allows SBC to decline to provide any "New" LSRs for "new lines being added to existing Mass

Market Unbundled Local Switching/UNE-P accounts" or any "Migration" or "Move" LSRs for Mass Market Unbundled Local Switching/UNE-P accounts. AL-18, p. 1. SBC insists that its interpretation is supported by Paragraphs 5 and 227 of the TRO Remand Order, which refer to UNE arrangements, not customers. SBC's position might be more persuasive had the FCC specified that on and after March 11, 2005, the embedded base that should benefit from the transition period was limited to existing lines and UNE arrangements. However, the FCC did not take such a limited approach in its rules. Rather, the FCC chose to require that an ILEC "shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve **its embedded base of end-user customers.**" Rule 51.319(d)(2)(iii). (Emphasis added). The distinction between the embedded base of *lines* versus the embedded base of end-user *customers* is critical and recognizes that the needs during the transition period of an existing CLEC customer may well go beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied.[7]

Finally, the Commission is persuaded by the arguments of Talk and XO to the effect that it would be contradictory for SBC to assert the right to unilaterally implement the requirements of the *TRO Remand Order* while it refuses to implement provisions approved by both the *TRO* and *USTA II* that are favorable to the CLECs, such as clearer EEL criteria, the ability to obtain routine network modifications, and commingling rights. However, these issues are not sufficiently momentous to require emergency consideration. Rather, the Commission finds that such

[7]*See, TRO Remand Order*, p. 128, paragraph 226 and footnote 626, which indicate the FCC's concern that its transition plan be implemented in a way that avoids harmful disruption in the telecommunications markets.

arguments are more properly considered in Cases Nos. U-14303, U-14305, and U-14327, which are scheduled for oral argument before the Commission on March 17, 2005.

In its February 28, 2005 order, this Commission recognized that "the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order." February 28 order, p. 5. Further, the Commission stated that the change of law provisions contained in the parties' interconnection agreements "must be followed." February 28 order, p. 6. As a result, the Commission finds that SBC shall not unilaterally implement its interpretation of the *TRO Remand Order,* which the Commission has determined to be erroneous. Rather, SBC may only implement the *TRO Remand Order* changes through the change of law provisions contained in the parties' interconnection agreements in the manner described in the Commission's February 28 order in this proceeding.

In the February 28 order, the Commission indicated that SBC could bill the CLECs at the rate effective March 11, 2005. However, the Commission further provided that SBC could not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there would be no undue benefit to the CLECs or harm to SBC due to the delay associated with the collaborative process, the Commission also provided that there would be a true-up proceeding at the end of the collaborative process. The Commission wishes to emphasize that these provisions remain in effect.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

et seq.; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The relief requested in the March 7 motion filed by Talk and XO should be granted in part and deferred in part, as more fully explained in this order.

THEREFORE, IT IS ORDERED that:

A. SBC Michigan shall provision high-capacity loops and transport on and after March 11, 2005 where a competitive local exchange carrier has self-certified that, to the best of its knowledge, the competitive local exchange carrier's request is consistent with the requirements of the Federal Communications Commission's February 4, 2005 *TRO Remand Order*.

B. SBC Michigan shall provision local service requests for mass market unbundled local switching, unbundled network element-platform, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops on or after March 11, 2005, consistent with the requirements of this order.

C. SBC Michigan shall comply with the requirements of both this order and the Commission's February 28, 2005 order in this proceeding.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(SEAL)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 9, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

Georgia Public Service Commission

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Docket No. 19341-U

In Re: Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements

ORDER ON MCI'S MOTION FOR EMERGENCY RELIEF CONCERNING UNE-P ORDERS

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth Telecommunications, Inc. ("BellSouth") to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the parties' interconnection agreement ("Agreement");

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *Triennial Review Remand Order* ("TRRO");

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth. The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

The FCC also made non-impairment findings with regard to dedicated loop and transport. For DS3-capacity loops, requesting carriers were found not to be impaired at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. (TRRO ¶146). The FCC found that "requesting carriers are not impaired without access to DS-1 capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators." *Id.* The FCC's non-impairment finding with respect to dark fiber loops applied to any instance. *Id.*

For DS1 transport, the FCC concluded that competing carriers were not impaired "on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines." (TRRO ¶ 66) (emphasis in original). Competing carriers were also found to be not impaired without access to DS3transport "on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). For dark fiber transport, competing carriers were found not to be impaired "without access on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). The FCC made an across the board non-impairment finding for entrance facilities. *Id.*

I. MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the TRRO it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . [MCI] or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

II. BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

III. Conclusions of Law

A. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission ("FERC"), the D.C. Circuit Court of Appeals held that it

is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching." (BellSouth Response, p. 4, *quoting* TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth does not cite to any language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to

monitor this area closely to ensure that parties do not engage in unnecessary delay.

(TRRO § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge, at minimum, that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Commission's decision is consistent with the conclusion it reached in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection

agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket, and concludes that such reasoning applies in this instance as well.

While MCI's Motion was entitled "Motion for Emergency Relief Concerning UNE-P Orders," the relief sought included could apply to both mass market local switching and dedicated loop and transport. MCI asked that BellSouth be ordered to implement the TRRO using the change of law provisions in the Agreement. In addition, MCI asked that the Commission order the relief it deemed just and reasonable. The Commission finds it just and reasonable to order parties to abide by the change of law provisions in their interconnection agreements for all changes, regardless of whether the change is on UNE-P or loops and transport. The analysis illustrating that the FCC did not intend to abrogate the parties' rights under their contracts applies as well to dedicated loop and transport.

In addition, the Commission concludes that it is just and reasonable to impose the requirement that parties abide by the terms of their interconnection agreements to implement the TRRO on all parties and the modification of all interconnection agreements. The question of whether the TRRO must be implemented pursuant to the parties' interconnection agreements must be resolved on an expedited basis. This same threshold question applies equally to all carriers. There is no reason why the TRRO would be deemed to abrogate some parties' contractual rights and not others. In light of the preceding, the most just and administratively efficient manner to resolve MCI's Motion is to apply the conclusions to the implementation of the TRRO in all interconnection agreements.

B. Issues related to a possible true-up mechanism should be decided at a later time.

The Commission finds that it is prudent to defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter was brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. The Commission determines that it may be of assistance for the Commission to confirm, prior to voting on this issue, that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved.

C. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of

the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Commission will decide those issues in the regular course of this docket.

IV. Ordering Paragraphs

WHEREFORE IT IS ORDERED, parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order and this condition applies to all carriers, not just MCI and BellSouth, and to all changes, regardless of whether the change is on UNE-P or loops and transport.

ORDERED FURTHER, that issues related to a possible true-up mechanism should be decided at a later time.

ORDERED FURTHER, that issues related to BellSouth's obligations to continue to provide mass market unbundled local switching or dedicated loop and transport under either Georgia law or Section 271 should be resolved by the Commission in the regular course of this docket.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of March, 2005.

Reece McAlister
Executive Secretary

Date: 3-8-05

Angela Elizabeth Speir
Chairman

Date: 3/8/05

STATE OF ALABAMA

ALABAMA PUBLIC SERVICE COMMISSION
P O BOX 304260
MONTGOMERY, ALABAMA 36130-4260

JIM SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C WALLACE, JR ASSOCIATE COMMISSIONER

WALTER L THOMAS, JR
SECRETARY

COMPETITIVE CARRIERS OF THE SOUTH, INC., **DOCKET 29393**

Petitioners

TEMPORARY STANDSTILL ORDER AND ORDER SCHEDULING ORAL ARGUMENT

BY THE COMMISSION:

I. Introduction and Background

This Docket was originally established to address the May 27, 2004 Petition of the Competitive Carriers of the South, Inc. ("CompSouth")[1] wherein CompSouth requested that the Alabama Public Service Commission (the "Commission") issue a Declaratory Ruling pursuant to Rule 22 of the Commission's Rules of Practice holding that the obligations of parties to interconnection agreements filed with the Commission should remain in effect unless and until such agreements are modified by amendments filed with, and approved by, the Commission. CompSouth asserted that the relief requested in its May 27, 2004 Petition was necessary due to various actions and statements by BellSouth Telecommunications, Inc ("BellSouth") following the issuance of the opinion of the United States Court of Appeals for the D.C. Circuit in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*" and sometimes "D.C. Circuit Decision").

CompSouth specifically asserted that certain statements made by BellSouth in various state commission proceedings and in carrier notification letters had created a question as to whether BellSouth intended to continue to honor its existing interconnection agreements with respect to the provision of certain Unbundled Network Elements ("UNEs").[2] CompSouth accordingly requested that the Commission issue an Emergency Declaratory Ruling specifying that: (1) BellSouth must continue to honor the

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[1] CompSouth represented that its members included Access Integrated Networks, Inc.; Access Point, Inc.; AT&T; Birch Telecom; Covad Communications Company; IDS Telecom, LLC; ITC DeltaCom; KMC Telecom; LecStar Telecom, Inc.; MCI; Momentum Business Solutions; Network Telephone Corp.; NewSouth Communications Corp.; NuVox Communications, Inc.; Talk America, Inc.; Xspedius Communications; and Z-Tel Communications. DSLnet Communications, LLC also joined the Petition of CompSouth.

obligations contained in its interconnection agreements, including its obligation to seek amendments to such agreements through the processes spelled out therein to effectuate changes in law, unless and until the Commission approves any modifications to those agreements; and (2) BellSouth may not undertake unilateral actions under color of *USTA II* to restrict the access of CLECs to UNEs or to change prices for UNEs unless and until the Commission approves such changes.

On May 28, 2004, BellSouth submitted its Initial Response to CompSouth's Petition for an Emergency Declaratory Ruling. BellSouth noted in its May 28, 2004 Response that it would file a formal response as directed by the Commission, but sought to initially advise the Commission that the CLEC industry had either misunderstood or was affirmatively misrepresenting BellSouth's position concerning the D.C. Circuit Court of Appeals decision in *USTA II*. BellSouth appended to its May 28, 2004 Initial Response a copy of a May 24, 2004 carrier notification letter in which BellSouth advised the CLEC industry that it would not "unilaterally disconnect services being provided to any CLEC under the CLEC's interconnection agreement" and would not "unilaterally breach its interconnection agreements"[3] BellSouth noted that the D.C. Circuit's issuance of a mandate in *USTA II* would not affect BellSouth's continued acceptance and processing of new orders for services including switched, high capacity transport and high capacity loops. BellSouth noted that it would bill for such services in accordance with the terms of existing interconnection agreements until such time as those agreements were amended, reformed and/or modified in a manner consistent with the D.C. Circuit's decision in *USTA II* and established legal processes.[4] BellSouth did, however, reserve all rights, arguments and remedies available to it under the law with respect to the rates, terms and conditions in existing interconnection agreements.

On June 22, 2004, BellSouth filed its formal Response in Opposition and Motion to Dismiss the Petition of CompSouth for an Emergency Declaratory Ruling. In said Response, BellSouth argued that there was no "emergency" with respect to the relief requested by CompSouth and no merit to CompSouth's Petition because BellSouth had clearly, consistently and without exception stated that it

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[2] CompSouth Petition for Emergency Delcaratory Ruling at pp. 1-7.
[3] BellSouth's Initial Response at p. 2.
[4] *Id.*

would honor its existing interconnection agreements. BellSouth reiterated its commitment to continue honoring its existing interconnection agreements until those agreements have been conformed to be consistent with the D.C. Circuit's mandate in *USTA II*.[5]

BellSouth also committed that it would not unilaterally increase the prices that it charged for mass market switching, high capacity dedicated transport, dark fiber, or high capacity loops for those carriers with existing interconnection agreements. Furthermore, BellSouth noted that it intended to implement the D.C. Circuit's mandate in *USTA II* via the "change of law" provisions in each CLEC's interconnection agreement.[6] BellSouth accordingly urged the Commission to dismiss the Petition of CompSouth, or in the alternative, to hold the Petition in abeyance.[7]

Upon review of the foregoing pleadings, the Commission concluded that BellSouth had provided adequate assurances that it would not attempt to unilaterally modify existing interconnection agreements with respect to the provision of services including mass market switching, high-capacity dedicated transport, dark fiber and high-capacity loops. The Commission further noted that BellSouth had conceded that its existing interconnection agreements must be amended in accordance with the "change of law" provisions in those agreements. The Commission accordingly found that CompSouth's Petition for an Emergency Declaratory Ruling should be held in abeyance so long as BellSouth continued to act in accordance with the representations made in the pleadings submitted in Response to CompSouth's Petition for Emergency Relief. The Commission did, however, afford the parties leave to submit supplemental pleadings in response to definitive rulings from the FCC and/or courts of competent jurisdiction with respect to the matters under review in this cause.

II. BellSouth's February 15, 2005 Notice of Issuance of Triennial Review Remand Order and Posting of Carrier Letter

On February 15, 2005, BellSouth filed with the Commission a Notice of Issuance of Triennial Review Remand Order and Posting of Carrier Letter. BellSouth therein advised the Commission that the Federal Communications Commission (the "FCC") had on February 4, 2005 released its permanent

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[5] *Id.* at p. 3.
[6] *Id.*
[7] *Id.*

unbundling rules in its *Triennial Review Remand Order*.[8] BellSouth further advised the Commission that it had on February 11, 2005 issued a carrier notification advising that the FCC had identified a number of former Unbundled Network Elements that will no longer be available as of March 11, 2005 except as provided in the *TRRO*. In particular, BellSouth stressed that the February 11, 2005 notification advised carriers that with regard to each of the former UNEs discussed in the *TRRO*, the FCC had provided that no "new adds" will be allowed as of March 11, 2005.[9] BellSouth further asserted that the *TRRO*'s provisions as to "new adds" were effective March 11, 2005 without the necessity of formal amendments to any existing interconnection agreements.[10]

In conclusion, BellSouth advised the Commission that in accordance with the terms of the *TRRO*, BellSouth had informed its carrier customers that effective March 11, 2005, BellSouth will no longer accept orders which treat the items affected by the *TRRO* as UNEs. In particular, BellSouth notified the Commission that it had informed its customers that as of March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices, to provide UNE transport between certain central offices, or to provide new UNE dark fiber loops or UNE entrance facilities.[11]

III. The February 25, 2005 Petition of MCI for Emergency Relief

By filing of February 25, 2005, MCImetro Access Transmission Services, LLC ("MCI") sought permission to intervene in this cause and Petitioned the Commission to issue a Declaratory Ruling requiring BellSouth to: (1) Continue accepting and processing MCI's UNE-P orders under the rates, terms and conditions of MCI's current interconnection agreement with BellSouth (the "MCI/BellSouth interconnection agreement"), and (2) Comply with the "change of law" provisions of the MCI/BellSouth interconnection agreement with regard to the implementation of the FCC's *TRRO* issued on February 4, 2005. As discussed in more detail below, MCI surmised that circumstances now exist that should cause this Commission to allow MCI to intervene and reactivate this matter.[12]

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[8] *In the matter of Unbundled Access to Network Elements; Review of the §251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (the *"TRRO"*).
[9] BellSouth Notice at pp. 1-2; *Citing TRRO* at ¶227.
[10] *Id.; Citing Attachment A*, p. 2.
[11] *Id.* at p. 2.
[12] MCI's Petition to Intervene is hereby granted.

MCI notes that it entered into an interconnection agreement with BellSouth on June 17, 2002 According to MCI, that agreement requires BellSouth to provide UNE combinations including "the combination of network element platform or UNE-P."[13] MCI asserts that said agreement further provides that "[t]he price for these combinations of network elements shall be based upon applicable FCC and Commission rules and shall be set forth in Attachment 1 of this agreement."[14] MCI maintains that those rates remain in effect today

MCI further asserts that the MCI/BellSouth agreement specifies the steps be taken if a party wishes to amend the MCI/BellSouth agreement because of a change in law. When the parties are unable to agree on how to implement a change in the law, MCI notes that the MCI/BellSouth interconnection agreement sets forth a dispute resolution process that is to be followed.[15]

MCI does not dispute that the FCC in its February 4, 2005 *TRRO* determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to §251(c)3 of the Telecommunications Act of 1996. MCI also does not dispute that the FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within 12 months of the effective date of the *TRRO* and determined that the price for §251(c)3 unbundled switching during the transition period would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004 plus one dollar, or (ii) the rate established by a state commission between June 16, 2004 and the effective date of the *TRRO* plus one dollar.[16]

With respect to new UNE-P orders after the effective date of the *TRRO*, MCI notes that the FCC stated that: "the transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to §251(c)3 except as otherwise specified in this order."[17] MCI argues, however, that the *TRRO* does not purport to abrogate the "change of law" provisions of carriers' interconnection agreements and in fact directs carriers to implement the rulings set forth in the *TRRO* by negotiating changes to those interconnection agreements.[18]

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[13] MCI's Motion for Emergency Relief at p. 3; *Citing MCI/BellSouth agreement at Attachment 3, §2.4*
[14] *Id.*
[15] *Id.* at p. 4; *Citing MCI/BellSouth agreement Part A, §§2.3 and 22.1*
[16] *Id.* at pp. 5-6; *Citing TRRO at §§227 and 228*
[17] *Id.* at p. 6; *Citing TRRO §227.*
[18] *Id.*; *Citing TRRO at §233.*

MCI points out that BellSouth issued a carrier notification dated February 8, 2005, wherein BellSouth noted the FCC's release of the *TRRO* and claimed that the *TRRO* precludes CLECs from adding new UNE-P lines starting March 11, 2005.[19] In an attempt to clarify BellSouth's intent, MCI asserts that on February 11, 2005, it sent a letter to BellSouth asking whether BellSouth intends to reject its UNE-P orders or charge a higher rate for new UNE-P lines in the event that MCI does not sign a "commercial agreement" with BellSouth by March 11, 2005.[20]

MCI notes that BellSouth issued a second carrier notification dated February 11, 2005 in which BellSouth expanded its interpretation of the *TRRO*. According to MCI, BellSouth claimed that "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to 'new adds' for ... former UNEs."[21] MCI further notes that BellSouth's February 11, 2005 carrier notification went on to state that "effective March 11, 2005 for 'new adds,' BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates for Unbundled Network Element Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs."[22] According to MCI, BellSouth also issued a change request along with the February 11 carrier notification that creates a new edit in its Operations Support Systems to reject all new orders for UNE-P effective March 11, 2005.[23]

MCI represents that it notified BellSouth on February 18, 2005, that the actions BellSouth had proposed would constitute a breach of the MCI/BellSouth interconnection agreement. MCI accordingly requested that BellSouth provide adequate assurances that it will perform pursuant to its existing interconnection agreements.[24]

In conclusion, MCI argues that the MCI/BellSouth interconnection agreement requires BellSouth to provide UNE-P to MCI at the rates specified in the agreement unless and until the agreement is amended pursuant to the "change of law" process specified therein. MCI thus asserts that BellSouth must continue to accept and provision MCI's UNE-P orders at the rates specified in the existing MCI/BellSouth

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[19] *Id*
[20] *Id* at p. 7; *Citing Exhibit B*
[21] *Id* at p. 7
[22] *Id*; *Citing Exhibit C*
[23] *Id*.; *Citing Exhibit D*
[24] *Id* at pp. 7-8.

interconnection agreement. By stating that it will not accept UNE-P orders beginning March 11, 2005, MCI asserts that BellSouth has breached the aforesaid agreement.[25]

MCI further concludes that the *TRRO* does not excuse or justify BellSouth's stated intention of refusing to accept MCI's UNE-P orders beginning March 11, 2005. To the contrary, MCI asserts that the *TRRO* requires that its rulings be implemented through changes to parties' interconnection agreements. According to MCI, implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among other issues, BellSouth's duty to continue to provide UNE-P to MCI at current rates under state law and under §271 of the federal act.[26]

IV. The February 25, 2005 Joint Petition of NuVox, Xspedius and KMC for Emergency Relief[27]

On February 25, 2005, NuVox Communications, Inc. ("NuVox"); Xspedius Management Company Switched Services, LLC on behalf of its operating subsidiaries Xspedius Management Company of Birmingham, LLC, Xspedius Management Company of Mobile, LLC and Xspedius Management Company of Montgomery, LLC (collectively referred to as "Xspedius"); KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V"), (KMC III and KMC V are collectively referred to as "KMC") (collectively NuVox, Xspedius and KMC are referred to as the "Joint Petitioners") also jointly filed a Petition for Emergency Relief (the "Joint Petition for Emergency Relief") requesting that the Commission issue an Emergency Declaratory Ruling finding that BellSouth may not unilaterally amend or breach its existing interconnection agreements or the Ruling Granting Joint Motion to Hold Proceeding in Abeyance entered by the Commission in Docket 29242 on December 16, 2004.[28] The Joint Petitioners filed their request for relief in light of BellSouth's February 11, 2005 carrier notification wherein BellSouth stated that certain provisions of the FCC's *TRRO* regarding new orders for delisted UNEs ("new adds") are self-effectuating

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[25] *Id.* at p. 8.
[26] *Id.*
[27] We note that ITC-DeltaCom Communications, Inc. ("ITC-DeltaCom") filed a letter in support of this Joint Petition of NuVox, Xspedius and KMC for Emergency Relief on February 28, 2004. To the extent that ITC-DeltaCom, NuVox, Xspedius and KMC have not been granted permission to intervene in Docket 29393 in their individual, company capacities, that permission is hereby granted.
[28] The proceedings in Docket 29242 concern the *Joint Petition of New South Communications Corp., et al. for Arbitration with BellSouth Telecommunications, Inc* The Order entered herein is intended to address the generic issues raised in Docket 29393 regarding compliance with existing interconnection agreements and how those agreements must be amended in order to properly incorporate changes of law. It is, however, recognized by the Commission that this Standstill Order and any final rulings entered in this Docket 29393 will have an impact on the arbitration being conducted pursuant to Docket 29242.

as of March 11, 2005. The Joint Petitioners assert that BellSouth's pronouncement of February 11, 2005 is incorrect and based on a fundamental misreading of the *TRRO*.[29] As with any change in law, the Joint Petitioners assert that the *TRRO* is a change in law that must be incorporated into existing interconnection agreements prior to being effectuated.[30]

Contrary to BellSouth's position, the Joint Petitioners vehemently assert that the *TRRO* is not self-effectuating with regard to "new adds" or in any other respects including any changes in rates or the availability of access to UNES. The Joint Petitioners in fact assert that the section of the *TRRO* entitled "Implementation of Unbundling Determinations" plainly states that "incumbent LECs and competing carriers will implement the Commission's findings as directed by §252 of the act." The Joint Petitioners note that §252 of the Telecommunications Act of 1996 requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation.[31]

The Joint Petitioners further assert that the FCC's decision to employ the traditional process by which changes of law are implemented is reflected in several other instances throughout the *TRRO*. By way of example, the Joint Petitioners note that with regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[32] The Joint Petitioners noted that the FCC reached similar conclusions with respect to modifications necessary to address high capacity transport and UNE-P arrangements.[33]

The Joint Petitioners also point out that in Alabama, the process for implementing the changes of law resulting from the *TRRO* are well underway in the Joint Petitioners' arbitration in Docket 29242 and the generic proceeding established by the Commission to address changes of law under Docket 29393. The Joint Petitioners assert that until these proceedings have been concluded and/or the parties reach negotiated resolution, the interconnection agreements in existence today must be abided by.[34]

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[29] Joint Petition for Emergency Relief at pp. 1-2.
[30] *Id*
[31] Joint Petition for Emergency Relief at pp 9-10.
[32] *Id*. at p. 10; *Citing TRRO at ¶196*.
[33] *Id ; Citing TRRO at ¶143 and 227*.
[34] *Id*. at p. 3.

In conclusion, the Joint Petitioners represent that the Commission must now act to prevent BellSouth from taking unilateral action on March 11, 2005, that will effectively breach and/or unilaterally amend the Joint Petitioners' existing interconnection agreements and most, if not all, other BellSouth Alabama interconnection agreements. The Joint Petitioners point out that for their operations, and those of other facilities-based carriers, essential UNEs such as high capacity loops and high capacity transport are jeopardized by BellSouth's February 11, 2005 carrier notification. The Joint Petitioners maintain that they and the Alabama consumers they serve will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the parties' existing interconnection agreements. The Joint Petitioners accordingly seek expeditious consideration of this matter and an order declaring, among other things, that the Joint Petitioners shall have full and unfettered access to BellSouth's UNEs provided for in their existing interconnection agreements on and after March 11, 2005 and/or until such time as those agreements are replaced by new interconnection agreements resulting from the arbitration proceedings in Docket 29242 or the final conclusions of the Commission in Docket 29393.[35]

V. Findings and Conclusions of the Commission

Having considered the foregoing pleadings, the findings and conclusions of the FCC in the *TRRO* and the conflicting language in the *TRRO* regarding implementation of the conclusions set forth therein, the Commission finds that the entire telecommunications industry in Alabama and the customers of that industry would be best served by further analysis of the issues set forth in the Petitions of MCI, NuVox, Xspedius and KMC. In order to facilitate that further analysis, the Commission finds that the Emergency Relief requested by MCI, NuVox, Xspedius and KMC is due to be granted for all CLECs operating in Alabama pursuant to existing interconnection agreements that have been submitted to and approved by this Commission.

In summary, BellSouth shall continue to honor the entirety of the rates, terms and conditions set forth in its existing interconnection agreements with CLECs in Alabama provided the agreements in question have been submitted to and approved by this Commission. BellSouth shall not, until further

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[35] *Id.* at pp. 3-4.

notice from this Commission, cease the provision of any UNE required to be provided pursuant to an existing interconnection agreement and shall provide such UNEs according to the rates established or otherwise referenced in such agreements.

In order to hasten a conclusion on the merits of the issues set forth in the foregoing pleadings,[36] BellSouth and the CLEC parties identified herein are hereby ordered to participate in Oral Arguments to be held on March 29, 2005, in the Main Hearing Room of the Commission's Chief Administrative Law Judge Carl L. Evans Hearing Complex in Montgomery, Alabama. Said Arguments shall commence at 10:00 A.M.. The various CLEC parties identified herein are collectively allotted a total of 45 minutes to initially argue in support of their position while BellSouth will be allowed an initial argument period of 25 minutes. The CLECs will be collectively allowed 15 minutes to rebut BellSouth's arguments while BellSouth will be allowed 10 minutes to rebut the arguments of the CLECs.

The parties are further advised that the Commission will endeavor to render a decision on the merits of the issues raised in the pleadings discussed herein and the Oral Arguments to be held on March 29, 2005 as soon as possible. In the event that the Commission ultimately rules in favor of BellSouth regarding the provision of UNEs and/or "new adds" on and after March 11, 2005, the parties are advised to carefully track any and all UNEs/"new adds" provided by BellSouth on and after March 11, 2005 for purposes of truing up the UNEs/"new adds" so provided by BellSouth in accordance with the provisions of the *TRRO* or any superseding commercial agreements entered by and between BellSouth and the affected carriers.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

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[36] The Commission notes that BellSouth has not yet filed a Pleading in response to the Petitions of MCI, NuVox, Xspedius and KMC. BellSouth shall do so on or before March 22, 2005.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 9th day of March, 2005.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary